November 13, 2020

Class & Collective Action Group Newsletter

Federal Appellate Courts

Order Reversing Certification of "Negotiation Class" in *In re National Prescription Opiate Litigation* (Sixth Circuit)

Key Issue

Whether a federal district court can, consistent with Federal Rule of Civil Procedure 23, certify a class for the purpose of negotiating a settlement.

Background

The national prescription opioid multi-district litigation includes over 1,300 individual lawsuits all consolidated in the Northern District of Ohio.[1] These lawsuits bring claims on behalf of various local governments and other government entities alleging that pharmaceutical manufacturers and distributors conspired to mislead doctors into overprescribing—and patients into overconsuming—opiate painkillers, resulting in addiction and a consequent public health crisis that consumed substantial government resources. In 2019, the special master appointed to oversee settlement negotiations in the case proposed "a new form of class action" involving what it called "negotiation class certification."[2] This proposal, subsequently adopted by the district court, reflected the special master's concern that the defendants were unwilling to settle these cases unless they could achieve a "global" settlement, and that a global settlement could not be achieved because of the risk that many of the plaintiffs already involved in the MDL would opt out of a settlement.[3]

To address this concern, the district court certified a so-called "negotiation class" that would "undertake the class certification and opt-out process prior to a settlement being reached," as is done with a traditional litigation class.[4] The certified class, which consisted of every city and county in the United States,[5] would have established, ahead of time, what percentage of any settlement would go to each class member.[6] With knowledge of their prospective recovery percentage (but not of their actual recovery), class members would have sixty days to opt out of the class.[7] Once the opt-out period

[1] *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664, 667 (6th Cir. 2020).

[2] *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532, 537 (N.D. Ohio 2019), *rev'd* 976 F.3d 664 (6th Cir. 2020).

[3] *Id.*

[4] *Id.*

[5] *In re Nat'l Prescription Opiate Litig.*, 976 F.3d at 667.

[6] *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. at 538.

[7] *Id.* at 538, 555.

concluded, the remaining class could negotiate and conclude binding settlement agreements with various defendants, subject to approval by a supermajority of votes in various subcategories of class members.[8] By ameliorating the defendants' concern about the unknown number of opt-outs, the district court reasoned, the negotiation class could promote a global settlement of claims in the MDL.[9]

A group of six Ohio cities, as well as several distributor and pharmacy defendants, brought a Rule 23(f) appeal challenging the certification of the negotiation class.[10]

Decision

On appeal, a divided Sixth Circuit panel reversed the class certification order, holding that the Federal Rules do not authorize the certification of a negotiation class and that a district court cannot certify classes not authorized by Rule 23.[11]

As an initial matter, the majority rejected the class representatives' contention that the defendant pharmacies and distributors lacked standing to pursue the appeal.[12] The representatives asserted that the defendants were not actually aggrieved by the district court's order because they were not actually required to negotiate or settle with the negotiation class: while plaintiffs who failed to opt out would be bound by any negotiated settlement, negotiation with the class by defendants was purely voluntary.[13] The majority nonetheless held that defendants were sufficiently aggrieved by the class certification decision to meet the low bar for appellate standing.[14] Even though defendants were not required to negotiate with the class, the very presence of the negotiation class "obviously affects the state of play"—the class was "designed to fundamentally alter the nature of the MDL" and the district court specifically noted it intended to "promote global settlement" of the litigation by certifying the class.[15] Accordingly, the defendants were "pressured, or at least strongly incentivized to negotiate with the class."[16] Because the certification affected "the contours of future settlement discussions and the individual MDL cases," it was sufficient to give the defendants appellate standing.

Next, the majority turned to the chief question presented by the appeal: whether this novel device of a "negotiation class" could be certified at all. The majority's decision turned chiefly on its view that such a class was simply not authorized by Rule 23, and that Rule 23 did not permit the kind of judicial inventiveness that, as the district court conceded,[17] had been employed in certifying the negotiation class.[18] The majority pointed to the Supreme Court's warning that "district courts do not have the liberty to invent a procedure with 'no basis in the Rule's text,' even absent language expressly prohibiting it."[19] Whatever the virtues of a new class action device, the district court could not depart from what was expressly authorized in the Federal Rules.[20] This

[8] *Id.* at 537.

[9] *Id.*

[10] *In re Nat'l Prescription Opiate Litig.*, 976 F.3d at 669.

[11] *Id.* at 675-76.

[12] *Id.* at 670.

[13] Brief of Plaintiffs-Appellees at 37-38, *In re Nat'l Prescription Opiate Litig.,* 976 F.3d 664 (6th Cir. 2020) *(*Nos. 19-4097/4099), 2020 WL 150322, at *37-38.

[14] *In re Nat'l Prescription Opiate Litig.*, 976 F.3d at 670.

[15] *Id.*

[16] *Id.*

[17] *See In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. at 537.

[18] *In re Nat'l Prescription Opiate Litig.*, 976 F.3d at 671.

[19] *Id.* (quoting *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338, 363 (2011)).

[20] *Id.*

limitation was especially important to the use of Rule 23, which imposes "demanding" requirements on class certification in order to balance the two goals of promoting efficient litigation and protecting the interests of individual litigants.[21]

Turning to Rule 23 itself, the majority noted that the text of the rule mentions only classes certified for trial and classes certified for settlement purposes; it nowhere mentions classes certified to negotiate a settlement.[22] The class representatives conceded that negotiation classes were not expressly mentioned by Rule 23, but pointed out that, until 2018, neither were settlement classes.[23] And yet the Supreme Court had ratified the use of settlement classes in *Amchem Products, Inc. v. Windsor* twenty-one years earlier, in 1997, without even discussing the lack of explicit textual basis for such classes.[24] According to the majority, however, before 2018, the use of settlement classes was clearly contemplated by the old language of Rule 23(e), which referred to the potential "compromise" of certified classes.[25] In the majority's view, there was no similar allusion to the possibility of certifying a negotiation class. Although it is true that a negotiation class might ultimately settle claims on behalf of the class, the "speculative possibility" of settlement did not make a negotiation class a class certified for settlement purposes, and so a negotiation class did not fall within the bounds of Rule 23.[26]

Finally, leaving aside the question of whether any negotiation class could be certified under Rule 23, the majority questioned the adequacy of the district court's predominance analysis. The district court found that the common questions pertaining to the plaintiffs' RICO claims sufficiently predominated to justify class certification.[27] However, the order certifying the class authorized the negotiation class to settle other claims arising out of common factual predicates, leaving open the possibility that the negotiation class might settle various state law claims as well as RICO claims.[28] The district court had therefore "papered over the predominance inquiry" for those claims, authorizing the negotiation class to settle claims for which Rule 23's requirements were not met.[29]

In a forceful dissent, Judge Moore rejected the majority's approach to the Federal Rules, contending that the Federal Rules were not designed to "manacle district courts that innovate within the Rules' textual borders."[30] Rather, courts should approach the Federal Rules by remembering that they are rooted in the rules of equity and view them as a flexible framework rather than as objects of "textual piety."[31] Because "[t]he Supreme Court itself promulgates and implements the Rules," interpreting them flexibly does not pose the same "judicial threat[] to separation-of-powers" that typically leads courts to consider the "traditional concerns surrounding statutory interpretation, such as deference to Congress."[32] Judge Moore emphasized that this approach was particularly apposite in the case of multi-district litigation, a device that was premised on the notion that certain large, complex litigations

[21] *Id.*

[22] *Id.* at 672-73.

[23] Brief of Plaintiffs-Appellees at 40-42, 2020 WL 150322, at *40-42.

[24] *Id.* at *42 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 618 (1997)).

[25] *In re Nat'l Prescription Opiate Litig.*, 976 F.3d at 672-73.

[26] *Id.* at 673.

[27] *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. at 548.

[28] *In re Nat'l Prescription Opiate Litig.*, 976 F.3d at 675.

[29] *Id.* at 675-76.

[30] *Id.* at 677 (Moore, J., dissenting).

[31] *Id.* at 678.

[32] *Id.*

cannot be resolved efficiently without inventive and perhaps "unorthodox" procedures.[33]

While the dissent recognized that these procedures must be ultimately rooted in the text of the Rules, it pointed out that the Rules do not contain the phrases "litigation class" or "settlement class."[34] Rather, Rule 23(e) simply provides that "[t]he claims, issues, or defenses of a certified class *may be* settled, voluntarily dismissed, or compromised."[35] The Rules do not expressly state that a class may be certified solely for the purposes of settlement, and yet such classes are routinely used.[36] Since negotiation is implicit within the concept of settlement, the dissent contended, the idea of a class solely certified for negotiation purposes is no less consistent with the Rules than a class solely certified for settlement.[37]

Thoughts & Takeaways

As MDLs continue to increase in number, size, and complexity, the Sixth Circuit has cautioned district judges against creating original procedures for resolving those cases, even (and perhaps especially) when the purpose of those procedures is to guide the parties toward settlement of cases that may prove difficult and time-consuming to litigate. The majority reiterated that, although the Federal Rules are formulated by the Supreme Court and its adjuncts, this formulation takes place under the aegis of the Rules Enabling Act and the Federal Rules have all the force of a Congressional statute.[38] The majority warned judges not to employ devices that lack a strong and explicit basis in the Federal Rules, no matter how useful a procedural device may seem. Thus, although it acknowledged the potential virtues of a negotiation class, the majority opinion nonetheless leaves it decidedly to the Rules Advisory Committee to undertake such innovation.[39]

The opinion is also notable for the broad approach it takes to appellate standing in the Rule 23(f) context. Although the defendants in this case were not technically required to negotiate with the negotiation class, and their rights were thus not technically limited by the district court's order, the court recognized that the certification of the negotiation class altered the strategic landscape of the opioid litigation and would, in practice, change how the defendants litigated their case. It therefore afforded the defendants standing to appeal the class certification. This is significant because class certification decisions one way or another often effectively decide a litigation. Because Rule 23(f) offers an opportunity for interlocutory appeal, this opinion may expand both plaintiffs' and defendants' chances to obtain judicial review of those decisions and make class certification a somewhat less final determination of class action suits.

Read the opinion here.

Order Vacating Class Settlement Approval in *Johnson v. NPAS Solutions, LLC* (Eleventh Circuit)

Key Issue

Whether a named plaintiff can be awarded an incentive payment in connection with a class settlement.

[33] *Id.* at 680.

[34] *Id.* at 681.

[35] *Id.* (quoting Fed. R. Civ. P. 23(e)) (emphasis in original).

[36] *Id.*

[37] *Id.* at 683-686.

[38] *In re Nat'l Prescription Opiate Litig.*, 976 F.3d at 672-73.

[39] *In re Nat'l Prescription Opiate Litig.*, 976 F.3d at 676-77.

Background

Plaintiff Charles Johnson, on behalf of a putative class, sued NPAS Solutions, LLC, alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227, related to NPAS's alleged use of an automatic telephone-dialing system to call him and others without consent. Less than eight months after Johnson's suit, the parties jointly filed a notice of settlement, and shortly thereafter Johnson moved to certify a settlement class.

The district court preliminarily approved the settlement, certified the class for settlement purposes, appointed Johnson as class representative, and permitted Johnson to "petition the Court to receive an amount not to exceed $6,000 as acknowledgement of his role in prosecuting this case on behalf of the class members."[40]

Class members were notified about the settlement, and only one member of the class, Jenna Dickenson, objected. Among other things, Dickenson objected to the court's decision to allow Johnson to petition for an incentive award, arguing that Supreme Court precedent prohibits such awards. Johnson and NPAS opposed Dickenson's objections, and Johnson petitioned the court for an incentive award.[41]

The district court ultimately entered final approval of the settlement, overruling Dickenson's objections without analysis and creating a $1,432,000 settlement fund, from which three items would be deducted before distribution to the class: (1) costs and expenses disbursed for administration of the settlement and notice to the class; (2) attorneys' fees and costs of 30% of the fund plus $3,475.52; and (3) a $6,000 incentive payment for Johnson, "as acknowledgement of his role in prosecuting this case on behalf of the [c]lass [m]embers."[42]

Dickenson appealed the decision, arguing that incentive awards violate Supreme Court precedent and create a conflict of interest between Johnson and absent class members who do not receive such awards.

Decision

A divided Eleventh Circuit panel held that two Supreme Court cases, *Trustees v. Greenough*[43] and *Central Railroad & Banking Co. v. Pettus*,[44] prohibit incentive awards for named plaintiffs in class actions. The majority noted that while "*Greenough* and *Pettus* are the seminal cases establishing the rule . . . that attorneys' fees can be paid from a 'common fund,'" they "also establish limits on the types of awards that attorneys and litigants may recover from the fund."[45]

In *Greenough*, a case predating Rule 23 as it exists today, the Supreme Court allowed a representative plaintiff to recover "his reasonable costs, counsel fees, charges, and expenses incurred in the fair prosecution of the suit" from the common fund which his litigation had secured for the benefit of himself and his fellow bondholders.[46] By contrast, the Court held that "allowances . . . . made for the personal services and private expenses of the complainant" were "decidedly objectionable."[47] The Court worried that providing payment for personal services and private expenses would "present too

[40] *Johnson v. NPAS Sols., LLC*, No. 9:17-cv-80393, 2017 WL 6060778, at *3 (S.D. Fla. Dec. 4, 2017).

[41] *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1250 (11th Cir. 2020).

[42] *Id.*

[43] 105 U.S. 527 (1882).

[44] 113 U.S. 116 (1885).

[45] *Johnson*, 975 F.3d at 1255-56.

[46] *Greenough*, 105 U.S. at 537.

[47] *Id.*

great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors, and that perhaps only to a small amount, if they could calculate upon the allowance of a salary for their time and of having all their private expenses paid."[48] In *Pettus*, the Supreme Court reiterated the basic framework set forth in its *Greenough* decision and clarified that attorneys' fees from a common fund may be paid directly to counsel, even if a representative plaintiff had not already agreed to pay counsel.[49]

Based on these decisions, the majority held that "the rule of *Greenough*, confirmed by *Pettus*, [is] fairly clear: A plaintiff suing on behalf of a class can be reimbursed for attorneys' fees and expenses incurred in carrying on the litigation, but he cannot be paid a salary or be reimbursed for his personal expenses. It seems to us that the modern-day incentive award for a class representative is roughly analogous to a salary—in *Greenough*'s terms, payment for 'personal services.'"[50] The majority reasoned that modern-day incentive awards create "even more pronounced risks than the salary and expense reimbursements disapproved in *Greenough*," because in addition to compensating plaintiffs for their time, these awards are intended to induce plaintiffs to participate in suits by offering an award beyond the recovery to which a plaintiff would otherwise be entitled.[51] This, according to the majority, is effectively a bounty.

The majority was not persuaded by Johnson's argument that *Greenough* and *Pettus* are inapplicable to class actions because Rule 23 did not exist at the time of those decisions, holding that the underlying facts were analogous to modern-day class actions, and observing that Rule 23 itself does not provide any basis to grant an incentive award. Nor was the majority compelled by Johnson's "appeal[] to ubiquity": although "incentive awards do seem to be fairly typical in class action cases . . . that state of affairs is a product of inertia and inattention, not adherence to law."[52] Ultimately, the panel reversed the district court's decision approving the settlement class, and remanded for further proceedings.[53]

Judge Martin dissented from the portion of the panel opinion reversing the district court's grant of an incentive award to Johnson, arguing that although incentive awards are not provided for in Rule 23, they have been routinely upheld by courts around the country and can be appropriate as long as the award is fair and does not "compromise[] the interest of the class."[54] The dissent noted that similar approaches have been adopted in the Third, Fourth, Eighth, Ninth, Tenth, and D.C. Circuits.

Thoughts & Takeaways

As noted by both the majority and dissenting opinions, incentive awards are extremely common; by at least one measure, they were granted in more than 70% of class settlements between 2006 and 2011.[55] *Johnson* is the first case to hold that these incentive awards are impermissible,[56] although it is

[48] *Id.* at 538.

[49] *Pettus*, 113 U.S. at 126.

[50] *Johnson*, 975 F.3d at 1257 (citation omitted).

[51] *Id.* at 1258.

[52] *Id.* at 1259-60 (citations omitted).

[53] The full panel vacated and remanded because, in light of the conclusory nature of the district court's opinion and explanation of its decision, the panel could not tell whether the district court abused its discretion. *Id.* at 1263. However, the full panel held the district court's decision to set a deadline for class members to object to the settlement (including the settlement's attorneys' fee provisions) before class counsel submitted their fee petition to be harmless error. *Id.* at 1255.

[54] *Johnson*, 975 F.3d at 1264, 1266 (Martin, J., dissenting in part) (citation omitted).

[55] Plaintiff-Appellee Charles T. Johnson's Petition for Rehearing *En Banc* at 5, No. 18-12344 (11th Cir. Oct. 22, 2020) (citing 5 William B. Rubenstein, *Newberg on Class Actions* § 17:7 (5th ed. 2020))

[56] *Johnson*, 975 F.3d at 1264 (Martin, J., dissenting in part).

not the only case to trace the legal foundation for incentive awards to the common fund doctrine.[57] *Johnson*, in an echo of the Supreme Court's logic in *Greenough*, reflects a skepticism about the need for and the propriety of an award which, by definition, encourages litigation that might otherwise go un-pursued.

Perhaps unsurprisingly, Johnson has petitioned for reconsideration of the panel opinion by the full Eleventh Circuit. Johnson's petition for rehearing has also attracted a number of amicus briefs in support of his claim to an incentive payment, including one authored by William Rubenstein, the current author of the class action treatise *Newberg on Class Actions* (which was cited in passing by the majority and extensively in the dissent). District courts have also taken notice of the decision.[58] Given the new ground struck by the panel decision and the prevalence of incentive awards, this opinion is unlikely to be the last word on the issue.

Read the opinion here.

Order Affirming Certification of Settlement Class in *Jabbari v. Farmer* (Ninth Circuit)

Key Issue

Whether a district court must conduct a choice-of-law analysis as part of the predominance inquiry when certifying a settlement class that would resolve both federal and state law claims.[59]

Background

In May 2015, plaintiff Shahriar Jabbari filed a class action complaint against the defendants, Wells Fargo & Company and Wells Fargo Bank, N.A.[60] Jabbari's action was consolidated with another action by Kaylee Heffelfinger alleging similar claims, and the plaintiffs filed a consolidated amended complaint on behalf of a putative class several months later.[61] The amended complaint alleged that the defendants engaged in and encouraged several practices in order to meet sales quotas, including that defendants opened up multiple accounts in the plaintiffs' names without their knowledge or consent.[62] These practices included, for example, "bundling," where the defendants allegedly added additional accounts under a customer's name when the customer went to open an account, without asking them. Another alleged practice was "pinning," where a Wells Fargo banker allegedly obtained a customer's debit card number and used it to open an online banking account under the customer's name in order to receive an additional sales credit.[63] These additional accounts accumulated fees that were unknown to plaintiffs, allegedly leading to debts and harm to their credit. Plaintiffs alleged that these practices and others violated state consumer protection laws in California and other states, as well as the federal Fair Credit Reporting Act ("FCRA").[64]

The parties reached a settlement to resolve all claims on behalf of a nationwide class of "[a]ll Persons for whom Wells Fargo . . . opened an Unauthorized Account or submitted an Unauthorized Application, or who obtained Identity Theft Protection Services

[57] *See, e.g., Hadix v. Johnson*, 322 F.3d 895, 898 (6th Cir. 2003) (holding that an incentive award is not proper without a common fund from which it could be drawn).

[58] *See, e.g., Hart v. BHH, LLC*, No. 15-cv-4804, 2020 WL 5645984, at *5 n.2 (S.D.N.Y. Sept. 22, 2020) (observing that *Johnson* is at odds with Second Circuit precedent and opining that "[the] issue is deserving of congressional attention"); *Jairam v. Colourpop Cosmetics, LLC*, No. 19-CV-62438-RAR, 2020 WL 5848620, at *3 (S.D. Fla. Oct. 1, 2020) (disapproving a service award in light of *Johnson*).

[59] *Jabbari v. Farmer*, 965 F.3d 1001 (9th Cir. 2020).

[60] *Jabbari v. Wells Fargo & Co.*, No. 15-cv-02159-VC, 2017 WL 5157608, at *2 (N.D. Cal. July 8, 2017).

[61] Consolidated Amended Complaint, *Jabbari v. Wells Fargo & Co.*, No. 15-cv-02159-VC (N.D. Cal. July 30, 2015), ECF No. 37.

[62] *Id.* at 1-4.

[63] *Id.* at 8-9.

[64] *Id.* at 26-27.

from Wells Fargo" during the class period.[65] The district court certified the settlement class, granted preliminary approval, and denied proposed intervenors' objections.[66]

Several objectors appealed the district court's certification of the settlement class, as well as approval of the settlement. The objectors argued in part that the district court had abused its discretion in certifying the settlement class by failing to conduct a sufficient predominance analysis under Federal Rule of Civil Procedure 23(b)(3).[67] The objectors noted that plaintiff had asserted numerous state law claims, but that class counsel had never provided evidence showing how common questions could predominate in the face of these disparate state law claims. For example, the objectors noted that only 20 states allow private civil actions for identity theft, and that only 10 allow recovery of actual damages. Identity-theft statutes in some states would require proof of intent, which the objectors argued could "stymie class certification."[68]

The district court's response to these objections was that the state law differences should not bar certification because the plaintiff's federal claim under the FCRA would be equally applicable in all states. However, the objectors argued that this was insufficient, and that the district court should have conducted a choice-of-law and predominance analysis.[69] The objectors pointed in particular to the Ninth Circuit's 2012 decision in *Mazza v. American Honda Motor Co.*,[70] where it had held that courts must apply California's choice-of-law rules to determine whether California law could apply to all plaintiffs in a nationwide class, and if not, whether variations in state law defeated predominance.[71]

Decision

A Ninth Circuit panel disagreed with the objectors and affirmed the district court's certification of the nationwide class.[72]

While the court noted that two of its prior decisions, *Mazza* and *Hanlon v. Chrysler Corp.*,[73] may have "blurred" an "imprecise line" as to whether a choice-of-law analysis is necessary to a predominance determination in putative class actions involving various state law claims, it found the two decisions to be reconcilable.[74] Unlike in *Mazza*, the Ninth Circuit in *Hanlon* affirmed certification of a settlement class that asserted various consumer protection claims, without requiring a choice-of-law analysis.[75] But, the panel reasoned that *Hanlon* affirmed certification of a *settlement* class, whereas *Mazza* reversed certification of a class for *trial*. The court found that these results were consistent with the general rule that "predominance is easier to satisfy in the settlement context."[76]

The panel further found that its 2019 decision in *In re Hyundai & Kia Fuel Economy Litigation*[77]

[65] *Jabbari*, 2017 WL 5157608, at *3.

[66] *Id.* at *1.

[67] Brief of Appellant at 2, *Jabbari v. Farmer*, 965 F.3d 1001 (9th Cir. 2018) (No. 18-16213), 2018 WL 6622283, at *2.

[68] *Id.* at *6-7, *13 (citation omitted).

[69] *Id.* at *10-16.

[70] 666 F.3d 581 (9th Cir. 2012).

[71] *Id.* at *12.

[72] *Jabbari*, 965 F.3d at 1009.

[73] 150 F.3d 1011 (9th Cir. 1998).

[74] *Jabbari*, 965 F.3d at 1006.

[75] *Id.*

[76] *Id.*

[77] 926 F.3d 539 (9th Cir. 2019).

solidified this rule. There, an *en banc* panel concluded that "[t]he criteria for class certification are applied differently in litigation classes and settlement classes," and held that the district court did not err under *Mazza* by failing to conduct a choice-of-law analysis when certifying a settlement class.[78] The *Jabbari* court therefore stated that "*Hyundai* [] dictates that, as a general rule, a district court does not commit legal error by not conducting a choice-of-law analysis, despite variations in state law, before determining that common issues predominate for a settlement class. For purposes of a settlement class, differences in state law do not necessarily, or even often, make a class unmanageable."[79]

Applying this rule, the panel held that the district court had not abused its discretion by foregoing the choice-of-law analysis for the settlement class at issue. Further, the panel reasoned that this rule "applies with even greater force" than it did in *Hyundai* (which involved only state consumer protection and common law fraud and negligent misrepresentation claims) because the *Jabbari* class was unified by a federal FCRA claim. The panel held that a district court may find predominance when a federal claim is present if "the federal claim [is] provable collectively and important enough to the litigation's resolution to bind the class together."[80] In the case against Wells Fargo, the FCRA claim could be proven collectively, using Wells Fargo's corporate policies, and the claim was important enough to the litigation's resolution, because the district court had found that the FCRA claim was the class's best route to certification and recovery.[81] While state law claims could result in recoveries separate from the FCRA claim, the district court did not err by concluding that "the FCRA claim, standing alone, provided the class with a reasonable recovery given the feasibility of all legal options that Plaintiffs and Objectors presented."[82]

Thoughts & Takeaways

This decision clarifies and reconciles the Ninth Circuit's prior holdings in *Mazza* and *Hanlon*, and builds on the *en banc* decision in *Hyundai* to confirm that district courts in the Ninth Circuit can conduct a more relaxed predominance analysis when certifying a settlement class. *Jabbari* makes clear that objections based on the presence of varied state law claims need not doom certification of a settlement class. It remains to be seen how other circuit courts will address this issue.[83]

Read the opinion here.

Decision in *Rittmann v. Amazon.com, Inc.* (Ninth Circuit)

Key Issue

Whether Amazon Flex delivery providers qualify as transportation workers "engaged in interstate commerce" and are thus exempt from the Federal Arbitration Act's ("FAA") enforcement provisions.

Background

Plaintiffs in this case are four individuals who provided delivery services for Amazon Flex. Through its Amazon Flex program, Amazon contracts with individuals to make "last mile"

[78] *Jabbari*, 965 F.3d at 1007 (quoting *Hyundai*, 926 F.3d at 556).

[79] *Id.* at 1007.

[80] *Id.* at 1007-08.

[81] *Id.* at 1008.

[82] *Id.*

[83] At least the Third Circuit has taken an approach similar to the Ninth Circuit's reasoning in *Hyundai* and *Jabbari*. *See Sullivan v. DB Inv., Inc.*, 667 F.3d 273, 297 (3d Cir. 2011) (under Third Circuit precedent, "concerns regarding variations in state law largely dissipate when a court is considering the certification of a settlement class"); *id.* at 303-04.

deliveries of products from Amazon warehouses to purchasers using their own mode of transportation.[84] The delivery providers, who are guided to the purchasers' locations by Amazon Flex's application, mostly deliver packages to purchasers in the same state, only sometimes crossing state lines to make deliveries.[85] The plaintiffs brought federal and state wage and hour claims against Amazon alleging that Amazon unlawfully misclassifies Amazon Flex delivery providers as independent contractors instead of employees.[86] The federal claims were brought as a putative nationwide collective action under the Fair Labor Standards Act, and the state law claims were brought on behalf of putative California and Washington state-wide classes.[87]

Amazon requires prospective delivery providers to agree to its Terms of Service, which (1) contain a binding arbitration provision unless the providers opt out within 14 days, and (2) require agreement that, to the extent permitted by law, a dispute will be conducted on an individual basis rather than as a class or collective action.[88] Three of the four named plaintiffs timely opted out of the arbitration provision. Amazon moved to compel arbitration of the fourth named plaintiff's claims.[89]

The district court concluded that Amazon Flex delivery providers are "workers engaged in foreign or interstate commerce" under Section 1 of the FAA,[90] and accordingly, their contracts were exempt from the FAA's enforcement provisions.[91] The district court then determined that the arbitration provision was not otherwise enforceable, as it was not evident from the contract which law governed the arbitration provision, nor whether the parties intended that provision to remain enforceable should the FAA exemption apply.[92] Finding that the parties had not entered into a valid arbitration agreement, the district court therefore denied Amazon's motion to compel arbitration.

Decision

A divided Ninth Circuit panel affirmed the district court's order denying Amazon's motion to compel. Central to the majority's decision was the meaning of "engaged in interstate or foreign commerce" within Section 1 of the FAA. Even though Amazon Flex delivery providers seldom cross state lines to make deliveries, could they still be "engaged in . . . interstate commerce" such that the FAA's enforcement provisions would not apply to their contracts?

The majority started by acknowledging the Supreme Court's decision in *Circuit City*, where the Court rejected a "sweeping, open-ended construction" of Section 1 of the FAA, instead holding that it should "be afforded a narrow construction"[93] and therefore "exempts . . . only contracts of employment of transportation workers" rather than all employment contracts.[94] But the majority concluded that *Circuit City* was not controlling as to the specific issue at hand.

Utilizing multiple tools of statutory construction—including the plain meanings of "engaged" and "commerce" at the time Congress enacted the FAA,

[84] *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 907 (9th Cir. 2020).

[85] *Id.*

[86] *Id.* at 908.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] 9 U.S.C. § 1.

[91] *Rittmann v. Amazon.com, Inc.*, 383 F. Supp. 3d 1196 (W.D. Wash. 2019).

[92] *Id.* at 1202-203.

[93] *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001).

[94] *Id.* at 119.

and courts' interpretations of similar language in other statutes—the majority held that "transportation workers need not cross state lines to be considered 'engaged in foreign or interstate commerce'" under Section 1 of the FAA.[95] Instead, Section 1 "exempts transportation workers who are engaged in the movement of goods in interstate commerce, even if they do not cross state lines."[96]

Applying this reasoning to Amazon Flex workers, the majority determined that they are engaged in interstate commerce. In doing so, the majority focused on the origination of the packages and the nature of the Amazon Flex business. The packages that Amazon Flex delivery providers pick up from Amazon warehouses are shipped to the warehouses from across state lines, and are then transported by the delivery providers to the customer. The transactions do not conclude until the packages reach the customer.[97] The packages, therefore, "are goods that remain in the stream of interstate commerce until they are delivered" in the "last mile" by delivery providers.[98] The majority also relied on a "nearly identical" case from the First Circuit that reached the same conclusion.[99]

The majority distinguished a recent Seventh Circuit decision that held that Grubhub delivery drivers, who deliver food orders to customers from local restaurants, do not fall within the Section 1 exemption.[100] In an opinion by then-Judge Barrett, the Seventh Circuit rejected the delivery drivers' argument that they are engaged in interstate commerce because "they carry goods that have moved across state and even national lines," such as "a piece of dessert chocolate [that] may have traveled all the way from Switzerland."[101] Adopting that argument, according to the Seventh Circuit, "would sweep in numerous categories of workers whose occupations have nothing to do with interstate transport."[102] But the Ninth Circuit majority considered that reasoning to be distinguishable: unlike the Grubhub delivery drivers, whose occupations were not "centered on the transport of goods in interstate or foreign commerce,"[103] Amazon Flex delivery providers' occupations are centered on delivering goods that Amazon ships across state lines.[104]

Finally, the majority determined that because neither the FAA nor Washington state law governed the arbitration provision, there was no valid arbitration agreement to enforce.

The dissent reasoned that workers must actually cross state lines while making deliveries in order to be "engaged in interstate commerce."[105] According to the dissent, this position aligns with the FAA's text and is "relatively easy to apply."[106] To the contrary, the majority's approach "invites difficult line-drawing problems" as to which classes of workers fall within the FAA exemption, and will "create uncertainty as to whether a dispute is arbitrable" in the future.[107] The dissent cited multiple times to the

[95] *Rittmann*, 971 F.3d at 910.

[96] *Id.* at 915.

[97] *Id.* at 916.

[98] *Id.* at 915.

[99] *Id.* at 910, 917 (citing *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 26 (1st Cir. 2020)).

[100] *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798 (7th Cir. 2020) (Barrett, J.).

[101] *Id.* at 802.

[102] *Id.*

[103] *Id.*

[104] *Rittmann*, 971 F.3d at 916.

[105] *Id.* at 921 (Bress, J., dissenting).

[106] *Id.* at 922-23, 926-29.

[107] *Id.* at 921, 930-31, 936-38.

Seventh Circuit's decision in *Wallace* as supporting its position, which the majority disputed.[108]

On September 25, 2020, the Ninth Circuit denied Amazon's petition for panel rehearing or rehearing en banc.[109] On November 4, 2020, Amazon filed a petition for writ of certiorari with the Supreme Court.[110]

Thoughts & Takeaways

The Ninth Circuit's decision opens the door for certain types of transportation workers to bring class and collective actions against their employers even in the face of arbitration provisions. As the dissent argued, and as the majority acknowledged, the majority's decision could invite potential line-drawing challenges for courts evaluating the interstate commerce exemption in the future. Indeed, while the panel characterized the Seventh Circuit's reasoning in *Wallace* as consistent with its opinion, an argument could be made that under *Rittman*, Grubhub delivery drivers are engaged in interstate commerce because they deliver food items that incorporate products, or are themselves, sent to local restaurants from out-of-state suppliers. Such an argument was made in *Wallace* but was summarily rejected.

Since *Rittmann* was decided, another Ninth Circuit panel has addressed a similar question with respect to Uber drivers. In *In re Grice*, a panel reviewed a district court's holding that rideshare drivers who pick up and drop off passengers at airports do not fall within the FAA exemption and thus may be compelled to arbitrate.[111] The plaintiff petitioned for a writ of mandamus vacating the district court's referral to arbitration.[112] The panel reviewed the district court's order for clear error, which is a "highly deferential" standard of review, and denied the petition, stating "[w]here no prior Ninth Circuit authority prohibits the district court's ruling, or where the issue in question has not yet been addressed by any circuit court in a published opinion, the ruling cannot be clearly erroneous."[113] The *Grice* panel recognized that there might be "some tensions" between the district court's holding and recent circuit cases (including *Rittmann* and *Waithaka*), but that tension did not establish that the district court committed "clear error."[114] In each of those cases, courts considered the nature of an employer's business to be the "critical factor" for determining whether workers qualify for the FAA exemption.[115] The panel reasoned that the plaintiff in *Grice* did not establish that he "provides rides only, or even primarily, to individuals coming from out-of-state," and therefore it was not clear that Uber's business is engaged in interstate commerce.[116]

It will be interesting to see how other courts address this issue and whether the Supreme Court will weigh in.

Read the opinion here.

[108] *See, e.g., id.* at 928, 937.

[109] Order, *Rittmann v. Amazon.com, Inc.*, No. 19-35381 (9th Cir. Sept. 25, 2020), ECF No. 70.

[110] Petition for Writ of Certiorari, *Amazon.com Inc. v. Rittmann*, No. 20-622 (Nov. 4, 2020).

[111] 974 F.3d 950, 954 (9th Cir. 2020).

[112] *Id.*

[113] *Id.* at 954-55.

[114] *Id.* at 958-59.

[115] *Id.* at 956-57.

[116] *Id.*

AUTHORS

Stephen J. Houck
+1 202 974 1629
shouck@cgsh.com

Allison Kim
+1 212 225 2445
alkim@cgsh.com

Michael Schulman
+1 202 974 1562
mschulman@cgsh.com

William E. Baldwin
+1 212 225 2078
wbaldwin@cgsh.com

EDITOR

Jared Gerber
+1 212 225 2507
jgerber@cgsh.com

PARTNERS, COUNSEL AND SENIOR ATTORNEYS – CLASS & COLLECTIVE ACTION GROUP

Matthew I. Bachrack
+1 202 974 1662
mbachrack@cgsh.com

Nowell D. Bamberger
+1 202 974 1752
nbamberger@cgsh.com

Lina Bensman
+1 212 225 2069
lbensman@cgsh.com

Jonathan I. Blackman
+1 212 225 2490
jblackman@cgsh.com

Carmine D. Boccuzzi Jr.
+1 212 225 2508
cboccuzzi@cgsh.com

Jeremy J. Calsyn
+1 202 974 1522
jcalsyn@cgsh.com

George S. Cary
+1 202 974 1920
gcary@cgsh.com

Alexis Collins
+1 202 974 1519
alcollins@cgsh.com

Roger A. Cooper
+1 212 225 2283
racooper@cgsh.com

Jared Gerber
+1 212 225 2507
jgerber@cgsh.com

Steven J. Kaiser
+1 202 974 1554
skaiser@cgsh.com

Mitchell A. Lowenthal
+1 212 225 2760
mlowenthal@cgsh.com

Abena Mainoo
+1 212 225 2785
amainoo@cgsh.com

Larry Malm
+1 202 974 1959
lmalm@cgsh.com

Thomas J. Moloney
+1 212 225 2460
tmoloney@cgsh.com

Mark W. Nelson
+1 202 974 1622
mnelson@cgsh.com

Breon S. Peace
+1 212 225 2059
bpeace@cgsh.com

Lisa M. Schweitzer
+1 212 225 2629
lschweitzer@cgsh.com

Matthew D. Slater
+1 202 974 1930
mslater@cgsh.com

Larry C. Work-Dembowski
+1 202 974 1588
lwork-dembowski@cgsh.com

Rishi N. Zutshi
+1 212 225 2085
rzutshi@cgsh.com

201111.03_111320